Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, INDIVIDUALLY and as CLASS REPRESENTATIVES ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

Respondent's Brief in Opposition confirms that certiorari should be granted.

1. Respondent does not dispute that the issues in this case are important. Nor does Respondent dispute that the issues before this Court are recurring, as highlighted by the amicus brief filed by the Tangier Sound Waterman's Association. Respondent is also unable to reconcile the decision below with this Court's decision in *Mullaney v. Anderson*, 342 U.S. 415 (1952), invalidating a virtually identical statute enacted by the Alaska Territorial Legislature.

2. Nor can Respondent reconcile the decision below with other decisions of this Court. Respondent does not even attempt to defend the Alaska Supreme Court's theory that, because fishing is a local activity, the Commerce Clause is not violated by Alaska's discriminatory fishing license and permit scheme. *See* Pet. 16-19.[1] Nonetheless, Respondent defends the Alaska Court's decision upholding the discrimination under the Commerce Clause. Respondent argues that the court below was correct in holding that residency discrimination does not implicate the Commerce Clause and should be tested only under the Privileges and Immunities Clause. Opp. 5.

Respondent concedes that this Court has never held that discrimination based on residency is permissible under the Commerce Clause. Opp. 5. As shown in the Petition (Pet. 13-16), the decision below conflicts with decisions of this Court holding discrimination based on residency to be unconstitutional. Although Respondent remarkably concedes that the cases we cited in the Petition "seem to support [Petitioners'] proposition," Opp. 6, Respondent nonetheless argues that they are distinguishable on

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[1] Respondent erroneously suggests that the court below did not theorize that fishing, as a "local activity," does not fall within the Commerce Clause. Opp. 8-9. While respondent is correct that the Alaska Supreme Court discussed such "local activity" in *Carlson I*, Pet. App. 47a-48a n.4, it also figured in the court's decision in *Carlson II*. *See* Pet App. 6a n.8.

their facts because in each case the discrimination was predicated on the movement of articles across state lines, not on residency. Opp. 7. But discrimination based on residency is impermissible whether or not movement across state lines is involved. In any event, as this Court has recognized, the movement of the non-resident fishermen into Alaska from out-of-state constitutes commerce: "[I]t is settled beyond question that the transportation of persons is 'commerce' within the meaning" of the Commerce Clause. *Edwards v. California*, 314 U.S. 160, 172 (1941). In addition, the movement of the harvested fish across state boundaries also constitutes interstate commerce. *See, e.g., Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 282 (1977).

Significantly, this Court long ago held that the Commerce Clause directly and explicitly reaches and prohibits discrimination based on residency status. *Edwards v. California*, 314 U.S. at 174. At issue in *Edwards v. California* was a California statute that barred "bringing into the State any indigent person who is not a resident of the State . . . ." 314 U.S. at 171 (quoting statute). This Court declared that "[i]t is difficult to conceive of a statute more squarely in conflict" with the core purposes of the Commerce Clause. *Id.* at 173; *see American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 282 (1987) ("the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among states"). The Alaska Supreme Court's decision declining to test the discrimination under the Commerce Clause plainly warrants this Court's review.

3. The Privileges and Immunities Clause holding of the Alaska Supreme Court also warrants review. Respondent does not dispute that it is in direct conflict with this Court's decision in *Mullaney v. Anderson*, 342 U.S. 415. Nonetheless, Respondent attempts to defend the holding of the court below, that discriminatory taxes can be justified under the Privileges and Immunities Clause by taking into account revenues foregone by residents and used to fund fishing management expenses. Respondent does not dispute that such general revenues could not

be used to justify discrimination under the Commerce Clause. *See, e.g., Fulton Corp. v. Faulkner*, 116 S.Ct. 848, 856 (1996); *Oregon Waste Systems v. Dep't of Environmental Quality*, 511 U.S. 93, 105 n.8 (1994).

Respondent can point to no meaningful distinction in principle between the Commerce Clause and the Privileges and Immunities Clause that should lead to a different result under the Privileges and Immunities Clause. As this Court has recognized, "permitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of intrastate taxation would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds." *Fulton Corp.*, 116 S.Ct. at 856. (quotation omitted).

Respondent also can point to no cases under the Privileges and Immunities Clause that have held that general tax contributions, much less foregone revenues, can justify discriminatory taxes on non-residents.[2] Thus, this Court should grant certiorari to resolve this important question.[3]

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[2] Respondent claims (Opp. 9) that dicta in *Toomer v. Witsell*, 334 U.S. 385 (1948), that a "State is not without power . . . to charge non-residents a differential which would merely compensate the State for any . . . conservation expenditures from taxes which only residents pay," *id.* at 398-99, establishes a "tax attribution doctrine" which permits states to justify discrimination against non-residents by reference to general tax revenues. But Petitioners concede that this Court has never upheld discrimination against non-residents on that basis. Opp. 11. Moreover, as we demonstrated in the Petition, the analogous doctrine has been rejected under the Commerce Clause. Pet. 21-23.

[3] While the license and permit fees at issue here are not user fees, *see Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939) (user fees are assessed "to reimburse the State for costs incurred in" providing specific, quantifiable services); *Commonwealth Edison v. Montana*, 453 U.S. 609, 621-22 (1981) (user fees apply to state-owned properties such

4. Although Respondent attempts to minimize the importance of the discriminatory fees, the importance of this issue in Alaska is well established.[4] Fishing is the second largest industry in Alaska. Pet. 2. As described in the Petition, commercial landings of fish in 1995 were valued at $1.4 billion, and generated over $77 million in taxes and fees to the State in 1994. Pet. 2-3 & nn. 2-4. Moreover, this case presents an important opportunity for this Court to address this discrimination, which is as widespread as it is unlawful. *See* Pet. 25-26 n.20. As the Tangier Waterman's Association pointed out in its *amicus* brief, the nature of the fishing industry, with commercial fishermen "loosely organized, if at all" and "often lack[ing] the financial resources necessary to mount a legal challenge against a state," Amicus Br. at 4, means that unconstitutional fees remain in place, even though their unconstitutionality was established more than forty years ago in this Court's decision in *Mullaney v. Anderson*.

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as airports, roads and transportation), it would not make any difference whether, as Respondent suggests, Opp. 15, the discriminatory tax is considered a "user fee" rather than a tax. Although this Court has said that user fees may be subject to a somewhat different analysis than taxes under some circumstances, *see Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 190 (1931), it has at the same time made clear that, like taxes, user fees are constitutionally permissible only if they do not discriminate against interstate commerce. *See, e.g., Oregon Waste Systems*, 511 U.S. at 103-04 n.6 ("even if the [Oregon] surcharge could somehow be viewed as a user fee, it could not be sustained given that it discriminates against interstate commerce"); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 356, 368 (1994) (user fee is valid only to the extent it "does not discriminate against interstate commerce"); *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972) (cited in Opp. 15 n.8) (upholding the facially neutral one dollar airline boarding fee "because both interstate and intrastate flights are subject to the same charges").

[4] Although Respondent attempts to distance itself from its own Annual Report (Opp. 1 n.2), that Report recognized that the overall permitting structure is designed to favor residents over non-residents. *See* Pet. 5.

If the states believe that this Court's decisions in state taxation can be ignored, the protections offered by the Commerce Clause and the Privileges and Immunities Clause will be meaningless. Review in this case is thus particularly important.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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